TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 211 of 2009

BETWEEN

ARCELORMITTAL POINT LISAS LIMITED
(formerly CARIBBEAN ISPAT LIMITED)

Appellant

AND

STEEL WORKERS UNION OF TRINIDAD AND TOBAGO

Respondent

****

PANEL:

A. MENDONCA J A

N. BEREAUX J A

R. NARINE J A

Appearances: Mr. S. Jairam S.C. and Ms. V. Gopaul instructed by Ms. E. Araujo for the Appellant.
Mr. D. Mendes S.C. and Mr. A. Bullock for the Respondent.

DATE DELIVERED: 9th December, 2011

I have read the reasons of Narine J.A. and agree with them.

A. Mendonca
Justice of Appeal.

I too, agree.

N. Bereaux
Justice of Appeal.

REASONS

DELIVERED BY NARINE J.A.

This is an appeal from a judgment of the Industrial Court dated 31st July 2009. The judgment was given on an application by the Respondent made by letter dated 29th December, 1997 in which the Respondent sought an order pursuant to section 2(1), 2(4)(b) and 7(e) of the Industrial Relations Act Chapter 88:01 (the Act) that Caribbean Ispat Limited (Ispat) was the employer of certain workers supplied by third parties to carry out work usually performed by workers represented by the Respondent.

By a written decision given on 31st July 2009, the Industrial Court held that Ispat was deemed to be the employer of the workers under labour only contracts pursuant to section 2(4)(b) of the Act. However, having so found, in accordance with section 10(3)(b) of the Act the court ordered Ispat to apply "the appropriate collective agreement(s)" to the workers concerned, and to pay interest on the monies payable to the workers at the rate of 8% from the due date to the date of payment, which it ordered should not be later than 30th September 2009.

The Appellant has not appealed the finding of the Court that Ispat was deemed to be the employer of the workers under labour only contracts. The appeal concerns the consequential order made by the court pursuant to Section 10(3)(b) of the Act, and the award of interest.

GROUNDS OF APPEAL:

1. The Industrial Court exceeded its jurisdiction and/or erred in law in making the said orders in that –
   (a) It purported to exercise a jurisdiction which was neither invoked nor capable of being invoked under the Act on the application before it;
   (b) It purported to act in accordance with section 10(3)(b) of the Act notwithstanding that the application before it was not a 'trade dispute' within the meaning of the expression as defined in the said Act;
   (c) The said orders purport to apply retroactively against the company and in favour of the workers concerned under expired collective agreement(s);
   (d) The said orders purport to enforce the collective agreement(s) between the Appellant Company and the Respondent Union notwithstanding the expiry of these collective agreements;
   (e) The said orders were made in contravention of the rules of natural justice, that is to say, without first affording the Appellant Company an opportunity to adduce evidence and/or arguments in relation to an award to the workers concerned.

SUBMISSIONS OF COUNSEL:

On behalf of the Appellant Mr. Jairam submitted in essence:

1. There are two instances in which the jurisdiction of the Industrial Court is invoked to apply or enforce collective agreements. These are
   (a) where an application is brought under section 16(2) of the Act, where there is any question or difference as to the interpretation or application of a collective agreement, and
   (b) pursuant to sections 51 and 59 of the Act which permit the referral of an unresolved trade dispute to the Industrial Court.

Since there was no existing trade dispute as defined by section 2 of the Act, and since there was no refusal by the Appellant to apply any collective agreement, it was premature for the Industrial Court to order the application and/or enforcement of any collective agreement to the workers in question. In the circumstances, the jurisdiction of

the Industrial Court did not arise, nor was it invoked by the application made under Section 2(4)(b) of the Act, which sought declaratory relief with respect to the legal status of the workers. Accordingly, in making the order for the application and enforcement of collective agreements, the Industrial Court acted in excess of jurisdiction.

2. By virtue of Sections 43, 47 and 48 of the Industrial Relations Act all expired registered collective agreements between the parties during the period 1997 to 2009 were unenforceable as collective agreements. By ordering the parties to apply the appropriate collective agreement(s), and not the existing registered collective agreement, the Industrial Court was in effect ordering the application and enforcement of expired collective agreements, contrary to the effect and intent of sections 43, 47 and 48 of the Act.

3. The orders for the application and enforcement of the appropriate collective agreement(s) were made in breach of the rules of natural justice, without affording the Appellant an opportunity to adduce evidence and/or arguments in relation thereto. The application itself did not invoke the court's jurisdiction to make the said orders, and the relief, though mentioned in the Respondent's Evidence and Arguments, were not pursued at the hearing. In addition, the court gave no prior indication that it was contemplating the exercise of its powers under Section 10(3)(b), before it gave judgment.

SUBMISSIONS OF THE RESPONDENT:

The Respondent submitted that:

1. The Appellant is barred by Section 18(2)(a) of the Act from pursuing his ground of appeal with respect to the jurisdiction of the Industrial Court to order that the collective agreements be applied to the workers.
2. Without prejudice to the foregoing submission, the Industrial Court had jurisdiction to make the order, since the Respondent had raised the issue of the applicability of the collective agreements in its Evidence and Arguments.
3. By virtue of Sections 10(1)(b) and 16(2) the Industrial Court had the jurisdiction to make the order that it did.

4. Although the Respondent did not expressly invoke section 16(2) of the Act, it was clear that the Respondent was contending that the Appellant was failing in its duty to apply the collective agreement to the workers. The fact that section 16(2) was not expressly alluded to, is of no consequence since in the hearing and determination of any matter before it, the court may act without regard to technicalities and legal form: section 9(1) of the Act. The failure to expressly refer to section

   16(2) of the Act was a technicality which did not prevent the Court from exercising its jurisdiction to order the Appellant to apply the collective agreement(s) to the workers.

5. Contrary to the assertions of the Appellant, the Respondent did not expressly or impliedly abandon its claim for the application of the collection agreement(s). On the contrary, the applicant expressly indicated through the oral submissions of its counsel that the application of the collective agreement was being pursued. Further, it could not be contended that the order of the court was premature on the basis that no trade dispute had arisen due to the failure of the Appellant to apply the collective agreement. It was not in dispute during the proceedings that the Appellant company was refusing to apply the collective agreement to the workers. Accordingly, it could not have been premature for the court to order the Appellant to apply the collective agreement.

6. By virtue of Section 10(7) of the Act, the court had jurisdiction to order the employer to pay the worker the amount to which he is entitled, and such amount is deemed to be damages.

7. As a court of record, the Industrial Court is empowered to award interest on damages: section 25 of the Supreme Court of Judicature Act Chap. 4:01.

8. The order of the court was not made in contravention of the rules of natural justice, since the issue of the application of the collective agreement was expressly raised in the Respondent's Evidence and Arguments, and the appellant was alerted to the fact that the Respondent was seeking that particular order. It was open to the Appellant to address the issue in a Reply, or in its submissions to the court.

ISSUES:

The issues that arise for decision are:

1. Whether the Court of Appeal has jurisdiction to entertain this appeal.
2. Whether the Industrial Court had the jurisdiction to make the orders for the application and enforcement of the appropriate collective agreements.
3. Whether the Industrial Court erred in law in ordering the Appellant to apply collective agreement(s) which, though current at the time of the Respondent's application to the Industrial Court, had expired by the time the Court gave its decision.
4. Whether the Industrial Court had the power to order the payment of interest on sums found to be due and payable by the Appellant.
5. Whether the orders of the Industrial Court were made in contravention of the rules of natural justice in that the Appellant was not provided with an opportunity to adduce evidence and arguments on the issue of the application and enforcement of the appropriate collective agreements to the workers.

LAW AND ANALYSIS:

Jurisdiction

The Respondent contends that the Appellant is not entitled to appeal on the ground that the Industrial Court had no jurisdiction to make the order for the application of the collective agreement(s) to the workers, since this jurisdiction had not been invoked by the Respondent's application before the Court. In making this objection, the Respondent relies on section 18 (2)(a) of the Act which provides:

> *"(2) Subject to this Act, any party to a matter before the Court is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other:*
>
> *(a) that the Court had no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award;"*

It is clear from Section 18(2)(a), that an Appellant is not entitled to raise lack of jurisdiction in the Court of Appeal unless objection to jurisdiction was taken in the proceedings before the Industrial Court. However, the condition does not apply to appeals grounded on excess of jurisdiction. Section 18(2)(b) expressly allows such appeals to be entertained by the Court of Appeal as of right. The instant appeal is based on excess of jurisdiction as opposed to lack of jurisdiction. Accordingly, the Appellant is entitled to pursue this ground of appeal as of right.

The Appellant's complaint on the ground of excess of jurisdiction is two-fold:

1. The jurisdiction to order the application of the collective agreements was not invoked by the application before the court, and
2. The Industrial Court purported to act in accordance with Section 10(3) (b) of the Act notwithstanding that the application before it was not a "trade dispute" within the meaning of the Act.

The application before the Industrial Court was brought by letter dated 29th December, 1997 addressed to the Registrar of the Industrial Court and signed by the Secretary of the Respondent. The letter was extremely brief, and it is set out in full:

> *"The Steel Workers' Union of Trinidad and Tobago hereby applies to the Industrial Court pursuant to Section 2(1) and 4(b) and Section 7(e) of the Industrial Relations Act Chapter 88:01 for an order that Caribbean ISPAT Limited is the employer under* ***labour only contracts*** *of all those persons employed by so-called contractors to perform work normally performed by worker (sic) in bargaining Unit I of which the Union is the recognized majority union".*

The application expressly invokes Section 2(1), section 2(4)(b) and section 7(e) of the Act. Section 2(1) of the Act is the interpretation section. It defines terms used in the Act such as, "bargaining unit", "collective agreement", "employer" and "worker". Section 7 sets out the powers and jurisdiction of the court in addition to the powers inherent in it as a superior court of record. Section 7(e) empowers the court "to hear and determine any other matter bought before it pursuant to the provisions of this Act."

Section 2(4)(b) provides:

(4) For the purposes of this Act –

(a) . . . . . .

(b) "where a person engages the services of a worker for the purpose of providing those services to another, then, such other person shall be deemed to be the employer of the worker under a labour only contract".

It is clear from the express reference to these provisions, and the wording of the letter itself, that the Respondent did not at this stage specifically seek an order of the court that the collective agreement in respect of the workers in bargaining unit 1 be applied to the workers in question.

However, in its Evidence and Arguments filed on 18th December, 1998, at paragraph 6, the Respondent unequivocally sought an order from the court declaring ISPAT to be the employer of the workers under labour only contracts and that ISPAT be bound to apply the collective agreement in relation to them. From this time, there could be little doubt that the Respondent was invoking the jurisdiction of the court to apply the collective agreement to the workers. Indeed, it would be pointless, if not purely academic, for the court to grant a declaration that the Appellant was the employer of the workers under a labour only contract in vacuo without going on to order that the relevant collective agreement should apply to them. Why else would the union seek the declaration, if not to afford the workers the benefits and protection of the collective agreement?

However, the Appellant contends that the Industrial Court had no jurisdiction to make an order in accordance with section 10(3)(b), since there was no trade dispute before it. In its submission, the court should have granted the declaration pursuant to Section 2(4)(b) and should have left it up to the parties to apply the appropriate collective agreement to the workers. If the Appellant failed or refused to apply the collective agreement, then a trade dispute would have arisen, which the parties would first address outside of the court process. If these procedures did not bear fruit, the parties would then go through a process of conciliation offered at the Ministry of Labour, and then at the Industrial Court. It is only as a last resort that the trade dispute would be referred to the Court for determination. In the circumstances, the order of the Industrial Court was premature.

This submission of the Appellant does not bear scrutiny. It contemplates that the parties would abide by the decision of the Industrial Court in relation to the status of the workers and act in accordance with good industrial relations practice. It follows that the parties would then sit and decide which collective agreement should apply, and calculate the amounts due to the workers under the terms and conditions of the agreements, and acting in good faith, would pay to the workers all such sums that are found to be due and payable.

The order of the Industrial Court did not deprive the parties of the opportunity of going through that process. The Court ordered that the Appellant should apply "the appropriate collective agreements" to the workers. It was then for the parties to work out what were "the appropriate" collective agreements, and apply them accordingly.

The Appellant further submits that there is no general or inherent power vested in the Industrial court by which it could apply or enforce collective agreements. The jurisdiction is invoked either pursuant to an application under section 16(2) of the Act for the interpretation or application of the provisions of a registered collective agreement, or under sections 51 and 59 of the Act which permit the report or referral of an unresolved dispute to the Industrial Court.

There is no dispute that the Respondent did not expressly refer to section (16)(2) in its application, nor was there a trade dispute referred to the Industrial Court pursuant to sections 51 and 59 of the Act. What is clear however, is that the Respondent was expressly seeking the application of the collective agreement to the workers in the relief it sought in the final paragraph of its Evidence and Arguments, and this was very early in the proceedings. While there was no express reference to Section 16(2) of the Act, the Appellant would have been under no misapprehension as to the substance of the application. The application under Section 2(4)(b) was brought precisely because the Appellant had refused and continued to refuse to apply the collective agreement to the workers.

The union was asking the court for a declaration of the legal status of the workers for the express purpose of having the terms and conditions of the workers in bargaining Unit 1 applied to workers who were providing the same services. This purpose could

not have been lost on the employer, since it was its refusal to apply the collective agreement that triggered the application to the Industrial Court in the first place.

The procedure to access the Industrial Court and the rules regarding proceedings before it, were designed for the use and benefit of workers and persons acting on behalf of workers, who are not required to be legal practitioners. The intention of the framers of the Act was clearly to ensure that the process of the Court would not be defeated or frustrated by technical legal arguments. This is made clear by section 9(1) of the Industrial Relations Act, which provides:

> *"9 (1) In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto". (Emphasis added)*

In addition, the court is given wide powers in order to achieve a just result in relation to any matter before it. Section 10 of the act provides, inter alia:

> *"10(1) The Court may, in relation to any matter before it—*
> *(a) …..*
> *(b) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;*
> *(c)…...*
> (d)……
> (2)…….

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall—

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations".

Accordingly, in our view the Industrial Court did not exceed its jurisdiction in making the order for the application of the collective agreement(s) to the workers in the matter before it having regard to the issues that were placed before it. The mere fact that section 16(2) was not expressly invoked cannot detract from the fact that what the Respondent was seeking was an application of the registered collective agreement, which the court has the express jurisdiction to deal with under section 16 2) of the Act.

ILLEGALITY:

The essence of the complaint of the Appellant is that the Industrial Court erred in law when it ordered the Appellant to apply expired collective agreements retroactively in favour of the workers.

It is to be noted at the onset that the Industrial Court did not expressly order the company to apply expired collective agreements. The court in fact ordered the company to apply "the appropriate collective agreement(s) to these workers". The company contends that the court was in effect ordering the application and enforcement of all collective agreements which existed in relation to bargaining Unit 1. Since the making of the application in December 1997, there would have been several agreements, which would have expired by the date that the court made the order in July 2009. In effect, the court was ordering the application and enforcement of collective agreements which had expired since the application was made. The Appellant contends that this is illegal, and the only collective agreement that could be applied was that which was existing at the date of the order, that is, 31st July 2009.

In support of this submission the Appellant relies on sections 43, 47 and 48 of the Industrial Relations Act, and the decision of this court in **Bank Employees Union v. Republic Bank Ltd** Civil Appeal No. 9 of 1995.

Section 43(1) of the Act provides that a collective agreement shall be for a specified term being three to five years. Section 47(1) provides that registered collective agreements shall be binding on the parties thereto, and shall be enforceable only in the Industrial Court. Section 47(2) provides that where applicable, the terms and conditions of a collective agreement shall be deemed to be terms and conditions of the individual contract employment of the workers comprised from time to time in the bargaining unit to which the registered agreement relates. Section 48 (2) provides that, notwithstanding section 43 (1), the terms and conditions of a registered agreement shall in so far as they relate to procedures for avoiding and settling disputes, be deemed to continue to have full force and effect until another collective agreement between the parties is registered.

The meaning and effect of these provisions were explained by Jones J.A. in the **Bank Employees Union** case (supra.) at page 11, where he stated:

> *"What Parliament has done specifically by section 48(2) is to permit the parties to use the dispute resolution procedures contained in the agreement after the agreement has expired. The specific reference to section 43(1) is significant since it is that subsection which determines the life span of a collective agreement. When the prescribed period expires what is left of the collective agreement are the provisions relating to the procedure for the resolution of disputes. The remainder of the collective agreement qua collective agreement dies, but the terms and conditions of the individual contracts of the workers do not die with the expiration of the collective agreement. They continue on until those terms are replaced, amended or confirmed by the new collective agreement. <u>They survive, not as terms of a registered collective agreement but as the terms and conditions of the individual contract of employment of the workers</u>. The dispute*

resolution procedures are preserved by section 43(2) and these may be invoked in dealing with any dispute that may arise." (emphasis added)

In this case, it is not in dispute that since the filing of the application in December 1997, the collective agreement then in existence, and subsequent collective agreements would have expired, before the Industrial Court gave its decision in July 2009. In the interim, some of the workers on whose behalf the application was filed would have left the employ of the company, and others would have taken their place. By virtue of the legislation, the terms and conditions of the expired collective agreements would have survived as terms and conditions of their individual contracts of employment, and the workers would have been entitled to be compensated accordingly.

By ordering the employer to apply "the appropriate collective agreement(s)", the court was clearly seeking to devise a formula by which the compensation due to each worker could be calculated by reference to the terms and conditions of workers in the same bargaining unit, as contained in the collective agreement then current at the time the workers provided their services to the company. It would have made little sense for the court to order the application of the collective agreement which was existing at time of the order, since clearly those terms and conditions would not apply to workers who had left their employment before the current collective agreement came into existence. Clearly, the most sensible interpretation of the order of the court, was that it was ordering the employer to apply the terms and conditions contained in the collective agreement existing at the time the services of each worker were provided, which would have become terms and conditions of his individual contract at the time that the statutory life of the collective agreement expired. In making this order, the court was not ordering the application of the collective agreement qua collective agreement, but as an agreement containing the terms and conditions of the worker's individual contract of employment pursuant to section 47(2) of the Act.

For all practical purposes, the sums due to each worker, so calculated, would be the same as if the worker had been paid at the time when the "appropriate" collective agreement was in existence. Once more, this court is of the view that this issue is essentially a technical legal point, which makes no difference to the calculation of the

workers' entitlement or to the outcome of this appeal. Accordingly, this court finds no merit in this ground.

INTEREST:

The Appellant also appealed the award of interest on sums payable to the workers. The power to award interest is given by section 25 of the Supreme Court of Judicature Act Chap. 4:01, which provides:

> *"25. In any proceedings tried in any Court of record for recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, but nothing in this section—*
> *(a) shall authorise the giving of interest upon interest;*
> *(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or*
> *(c) shall affect the damages recoverable for the dishonour of a bill of exchange".*

By virtue of section 4(1) of the Act, the Industrial Court is a superior court of record. Further, by virtue of section 10(7) of the Act, the sums awarded to the workers under the order, are deemed to be damages. Accordingly, the Industrial Court had the power to make the order for the payment of interest on monies due to the workers under the award it made.

NATURAL JUSTICE:

The Appellant further complained that the orders of the Industrial Court were made in contravention of the rules of natural justice, that is to say, without first affording

the Appellant an opportunity to adduce evidence and/or arguments in relation to an award to the workers.

As indicated earlier, it was never in dispute in this matter that the appellant was persistently refusing to apply the collective agreement for bargaining Unit I to the affected workers. Clearly, this is what prompted the union's application to the Industrial Court. The underlying purpose of the application under section (2)(4)(b) of the Act was to ensure that the employer accorded to the workers the same terms and conditions contained in the collective agreement in relation to workers providing the same services in bargaining Unit I. To make the position even clearer, in its Evidence and Arguments filed on 18th December, 1998 the union expressly asked the court for an order that the employer be bound to apply the collective agreement in relation to the workers on whose behalf the application was made. This relief was never expressly or impliedly withdrawn. It was in fact, expressly alluded to by Attorney for the Respondent (at page 440 of the Record) in oral submissions before the Industrial Court.

Accordingly, the Appellant had every opportunity to deal with the issue, in a Reply or in submissions before the Industrial Court. It failed to avail itself of this opportunity and cannot now complain as it does, that the court made the order without giving it an opportunity to address the issue. The appellant ought to have been aware that the court was being asked to make an order that the collective agreement be applied to the workers, and should have dealt with the issue in proceedings before the court. Accordingly, there is no merit in this ground.

For these reasons we dismissed this appeal and made no order as to costs.

Dated this 9th day of December, 2011.

Rajendra Narine,
Justice of Appeal.